UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

DATE: June 27, 1997

CASE NO.: 95 INA 126

In the Matter of:

ST. CROIX AVIS NEWSPAPER,
Employer,

on behalf of

ED WYNN BRYANT,
Alien

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Ed Wynn Bryant (Alien) by St. Croix Avis Newspaper (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform skilled or unskilled labor may receive a visa, if the Secretary of Labor (Secretary) has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On April 6, 1994, the Employer filed an application for labor certification on behalf of the Alien to fill the position of "Managing Editor" for a newspaper. AF 04. The job duties for the position in question were described as follows:

> Direct editorial activities of newspaper. Formulate editorial policy and direct operation of newspaper. Direct page makeup of publication and write leading or policy editorials. Originate plans for special features or projects. Assign persons to implement plans. Review employee performance and report to publisher. Review financial reports and take appropriate action with respect to costs and revenues. Inspect final makeup of editions, rearrange to meet emergency news situations.

The Employer required a baccalaureate degree in science in Journalism as the Field of Study, plus two years of on the job training and four years of experience as a reporter/newswriter correspondent. The Other Special Requirements were four years in a related occupation "Experience as newswriter, reporter, editor." AF 21.

Notice of Findings. By a Notice of Findings (NOF) on July 26, 1994, the CO advised the Employer that, subject to rebuttal, certification would be denied because (1) the normal requirements for the position of managing editor were four to ten years of combined education, training and/or experience, and that the Employer's requirements were excessive as first stated in its original application in AF 04; (2) the Employer's "Special Requirements" also were restrictive; (3) the Employer erroneously listed the Department of Labor as the contact person on its notice of the job opportunity; (4) Item 11 on the Alien's ETA 750B showed that he did not have a B.S. in journalism, and Item 15 suggested that the Alien was unqualified under the Employer's minimum requirements for the position before he was hired in the position by the Employer; (5) the job order was not placed over the local office name in conjunction with the job order; and (6) Item 17 on the ETA 750A did not reflect the number of employees the Alien would supervise. Employer was allowed to amend the requirements deemed to be restrictive, re-post the notice, complete the ETA 750A, and show proof of placement of local

office ads or state its willingness to place such ads.

Rebuttal. On August 18, 1994, Employer submitted rebuttal and other materials to remedy and respond to the defects noted in the NOF. (1) The Employer indicated its willingness to reduce the educational, training, and experience requirements to those listed in the Dictionary of Occupational Titles, i.e. to a high school education, two years on the job training and four years of experience as a reporter/newswriter/correspondent. Employer was also willing to limit the "Special Requirements" to "Experience as news writer, reporter, editor," and was willing to re-post the notice of the job opportunity. The Employer stated that it did place advertisements over the local office name as required, and amended Item 17 of the ETA 750A to show that the number of employees to be supervised was twelve.[2]

Final Determination. In the September 8, 1994, Final Determination the CO denied certification, finding that while items 1, 2, 3, 5 and 6 were adequately addressed, item 4 was a material defect. AF 27. Even taking into account the amended minimum requirements for the position, Employer had failed to demonstrate that the Alien met Employer's newly amended minimum requirements before he was hired by the Employer. First, the ETA 750B did not indicate that the Alien had four years of high school and, second, Item 15 of the ETA 750B did not reflect that the Alien had two years on the job training and four years of experience as a newswriter, reporter, editor before he was hired by the Employer.

Appeal. By the Employer's letter of October 7, 1994, it requested reconsideration and review of the CO's denial of certification. AF 104. The Employer argued that it had amended its minimum educational, training and experience requirements to reflect the qualifications possessed by the Alien at the time of hire. Due to inadvertence, however, those qualifications were not expressly stated at Items 11 and 15 on Form ETA 750B. On November 7, 1994, the CO denied the motion for reconsideration, as the issues it addressed should have been raised in the rebuttal. **Harry Tancredi,** 88-INA-441 (Dec. 1, 1988)(en banc).

DISCUSSION

An employer is required by 20 CFR § 656.21(b)(5) to document that the requirements for the job opportunity are the minimum necessary for the performance of the job and that it has not hired or that it is not feasible to hire workers with less training and/or experience. The Employer in this case was clearly aware that the Alien's education and experience, as

[2]See AF 21, as quoted and cited supra.

listed in ETA 750B, Items 11 and 15, were not sufficient to establish that the Alien had the minimum requirements for the position before he was first hired by the Employer. Indeed, Item 11, where the Alien's educational background was given, showed no names and addresses of any schools. Instead, the applicant said the, "Alien is self taught Renaissance man who has benefitted from hands on experience and training in his various positions." AF 02. This obviously is not evidence of a baccalaureate degree in journalism, nor is it the high school degree that was required by the amended version of the Employer's minimum requirement. While Employer's brief offered new facts about the Alien's educational, training and work histories, this Board is limited to the record on which the labor certification was denied when it reviews the denial of labor certification on appeal pursuant to the request for review and any statements of position or legal briefs submitted. 20 CFR § 656.27(c). For this reason, any new facts that were not previously in the record will not be considered in this proceeding at this time. **Capriccio's Restaurant**, 90-INA-480 (Jan. 7, 1992); **O'Malley Glass & Millwork Co.,** 88-INA-49 (March 13, 1989). In this case the CO reasonably requested that the Employer produce evidence that the Alien met its minimum requirements before it hired him. The Employer's failure to document that the Alien met its job requirements in response to the CO's request justifies denial of certification. **Studio Marble, Inc.**, 93-INA-313 (Aug. 25, 1994).

Employer contends in the brief that every finding made in the NOF was addressed in rebuttal, and that "nowhere in the [NOF] was it clearly stated that Item 11 of ETA 750B must be amended." On the other hand, the Employer was put on notice in the NOF that the Alien did not have the educational background it prescribed before he was hired. For this reason the CO required the employer either to amend its requirements to those that the Alien had at the time he was hired or to submit evidence that the Alien had a B.S. degree in journalism at the time he was hired. The Employer elected to reduce its educational requirement from a college degree to a high school degree, however. As no educational degree was given for the Alien and the Employer asserted instead that he was a "self taught Renaissance man," the Employer's attempt to amend Item 11 clearly failed to remedy the defects in this application. Employer neither amended the educational requirement to reduce the educational qualifications to those of a "Self taught Renaissance man," nor did it establish that the Alien had the B.S. degree in journalism that it required of all U. S. job applicants.

While the Employer did amend the requirement to a high school degree, it failed to prove that the Alien's failure to meet this requirement is not the result of a lack of clarity on the part of the CO. Indeed, Employer's action demonstrates that it was aware of the need to amend Item 11, but the Employer

failed to rebut the above-noted finding, nevertheless. From this it follows that certification was properly denied by the CO.

ORDER

The Certifying Officer's denial of labor certification is Affirmed for these reasons.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Sheila Smith, Legal Technician

BALCA VOTE SHEET

CASE NO.: 95-INA-126

ST. CROIX AVIS NEWSPAPER, Employer,
ED WYNN BRYANT, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 9, 1997